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In the Supreme Court of the United States

OCTOBER TERM, 1977

BETH ISRAEL HOSPITAL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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INDEX

Page

Opinions below 1

Jurisdiction 1

Question presented 1

Statute involved 2

Statement 2

Argument 6

Conclusion 11

CITATIONS

Cases:

Beth Israel Hospital, 228 NLRB No. 195, 95 LRRM 1087 7

Lutheran Hospital of Milwaukee Inc. v. *National Labor Relations Board*, C.A. 7, No. 76-1688, decided October 5, 1977 7

Republic Aviation Corp. v. *National Labor Relations Board*, 324 U.S. 793 8

St. John's Hospital and School of Nursing, Inc., 222 NLRB 1150 5

St. John's Hospital and School of Nursing, Inc. v. *National Labor Relations Board*, 557 F. 2d 1368 ..... 7, 10

Statutes:

National Labor Relations Act, 61 Stat. 136, 73 Stat. 519, 88 Stat. 395, as amended, 29 U.S.C. (and Supp. V) 151 *et seq.* 2

Section 7, 29 U.S.C. 157 6

Section 8(a)(1), 29 U.S.C. 158(a)(1) 5

Section 8(a)(3), 29 U.S.C. 158(a)(3) 5

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 49-59) is reported at 554 F. 2d 477. The decision and order of the National Labor Relations Board (Pet. App. 21-47) are reported at 223 NLRB 1193.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1977. The petition for a writ of certiorari was filed on July 27, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board properly concluded, on the facts of this case, that a hospital

violated Section 8(a)(1) and (3) of the National Labor Relations Act by issuing and maintaining no-solicitation/no-distribution rules that prohibit employees during non-working time from soliciting union support and distributing union literature in the hospital cafeteria and coffee shop.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. (and Supp. V) 151, *et seq.*), are set forth at Pet. App. 19-20.

STATEMENT

A. This case arose when the Massachusetts Hospital Workers Union, Local 880, Service Employees International Union, AFL-CIO, filed with the National Labor Relations Board an unfair labor practice charge challenging the petitioner Hospital's no-solicitation/no-distribution rule as applied in its cafeteria and coffee shop (Pet. App. 24). The Board found the following facts:

Petitioner Beth Israel Hospital is a nonprofit health care institution which employs 2,200 persons excluding house staff, attending physicians, students, and employees of Harvard University who work on the premises (Pet. App. 25).[1]

In July 1974 the Hospital established the following rule restricting solicitation and distribution of literature on Hospital property (Pet. App. 28-29):

> Hospital employees who want to solicit other employees for the Union or other causes may do so

[1]The National Labor Relations Act was amended, effective August 25, 1974, to extend its coverage and protection to employees of nonprofit health care institutions. 88 Stat. 395.

> when they are not on their own working times, but only in two well-defined locations of the Hospital:
>
> 1) Employee-only areas—employee locker rooms and certain adjacent rest rooms; and
>
> 2) Cafeteria and coffee shop.
>
> In the locker areas literature may be offered. In the cafeteria and coffee shop, conversations may take place on a one-to-one basis but there is to be no setting up of special tables, public distribution of literature nor any form of coercion. Elsewhere within the Hospital, including patient-care and other work areas, the lobbies, corridors, elevators, libraries, meeting rooms, etc., there is to be no solicitation nor distribution of literature. Soliciting of patients and visitors is expressly prohibited at all times and places.

The Hospital's cafeteria and coffee shop, which are adjacent, are open to employees, patients, and visitors. They contain two serving lines and a number of vending machines, and have a combined seating capacity of approximately 300 persons. There is no employee-only eating facility in the Hospital. A study of cafeteria use conducted by the Hospital indicated that the employees purchased more than 75 percent of the meals served in the cafeteria and that the heaviest use by visitors was in the evening. Patient use of the cafeteria is relatively slight. (Pet. App. 39; JX 20, 25).[2]

The Hospital uses the cafeteria area for communication with the employees. Posters publicizing a Hospital cost reduction drive and charity campaigns have been placed

[2]"JX" refers to the joint exhibits introduced by the parties at the hearing before the Board.

in the area. There is a travel brochure rack and a table on which are placed commercial solicitations, such as brochures and applications for insurance programs, tennis camps and film processing. Upon occasion the Hospital has set up a table in the cafeteria to promote special campaigns. (Pet. App. 33, 39-41.)

While the rule was in effect,[3] employee Ann Schunior, a research technician, distributed a union newsletter in the cafeteria. On her lunch hour, she went from table to table and asked people she recognized or thought were employees whether they would like a copy of the union newsletter. When Schunior was in doubt as to someone's employee status, she first asked if he or she were an employee and explained that she was passing out literature for employees. (Pet. App. 29-32.) While distributing the newsletter Schunior was given a verbal warning by the Hospital's general director. Subsequently, she received a written notification that further violation would result in dismissal. (Pet. App. 32.)

B. The Administrative Law Judge concluded that the Hospital's restrictions on union solicitation and

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[3]After the unfair labor practice complaint in this case issued, the Hospital modified its rule to bar any solicitation or distribution of literature in any areas open to the public, including the cafeteria and coffee shop (Pet. App. 30).

On April 9, 1975, the unfair labor practice complaint was amended to encompass the Hospital's revised rule (Pet. 3).

Under the revised rule, solicitation, like distribution of literature, is totally prohibited in the cafeteria area and is limited to employee-only areas—"employee locker rooms and certain adjacent rest rooms" (Pet. App. 30). Lockers are scattered throughout the hospital in some 63 locations. However, there are only four large locker rooms plus two smaller rooms, containing 613 lockers, which are open to employees generally. In addition, there are locker areas containing 470 lockers which are available only to employees who are assigned

distribution of literature in the cafeteria and coffee shop violated Section 8(a)(1) of the Act, and that the Hospital also violated Section 8(a)(3) and (1), 29 U.S.C. 158(a)(3) and (1), by threatening employee Schunior with discharge if she continued to distribute literature in the cafeteria (Pet. App. 21, 42-43). He was (Pet. App. 42)

> not persuaded that the [Hospital] has offered any convincing evidence to demonstrate that the rule is needed, either by reason of actual or suspected interference with patients, visitors or non-employees. Thus, I am unable to find that the [Hospital] has made a sufficient showing of impairment with its principal obligation, namely, the care of patients, to justify the rule.

He found that the Hospital permitted solicitation in the cafeteria for non-union matters, and that there were no other places where employees could meet in the Hospital or in the nearby area to discuss non-work related matters (Pet. App. 40-42).

The Board upheld the Law Judge's conclusion, but also stated in a footnote, citing its intervening decision in *St. John's Hospital and School of Nursing, Inc.*, 222 NLRB 1150, that "the [Hospital] also violated Sec. 8(a)(1) by maintaining an overly broad no-solicitation, no-distribution rule that prohibited all solicitation and distribution in all areas to which patients and visitors have access and employees have access during non-working time other than immediate patient care areas" (Pet. App. 21-22 n. 2).[4]

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lockers in those areas. The Hospital does not utilize the locker rooms and locker areas to communicate with its employees. (Pet. App. 38.)

[4]In *St. John's Hospital and School of Nursing, Inc., supra,* the Board held that no-solicitation rules are presumptively invalid in all

The Board's order required the Hospital to "[r]escind its written rule prohibiting distribution of union literature and union solicitation in its cafeteria and coffee shop," and to cease and desist from interfering "in any like or related manner" with its employees' rights under Section 7 of the National Labor Relations Act, 29 U.S.C. 157 (Pet. App. 22, 44-45).

C. The court of appeals affirmed (Pet. App. 49-59). It agreed with the Board that the Hospital had failed to establish special circumstances justifying its prohibition of employee solicitation and distribution in the cafeteria and coffee shop (Pet. App. 54-56). However, noting the absence of any record evidence pertaining to the impact of employee solicitation and distribution in other public areas, the court held that the Board's decision and order determined "no more than the status of the cafeteria and coffee shop" (Pet. App. 57-58). It therefore did not decide whether, under the Board's footnote citing *St. John's Hospital and School of Nursing, Inc., supra*, the Hospital rule was also invalid as applied to all other non-patient care areas and held that the Hospital was not collaterally estopped from further litigating the validity of its rule in other areas (Pet. App. 50).[5]

ARGUMENT

1. The broad issue which petitioner seeks to raise—*i.e.*, whether a hospital may properly bar employees from engaging in union solicitation and literature distribution

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public areas of hospitals other than immediate patient-care areas, to which patients, visitors, and employees have access.

[5]The court also refused to enforce the Board's broad cease and desist order on the ground that no proclivity to violate the Act had been shown (Pet. App. 58-59) .

in any areas of a hospital to which patients have access—is not presented here. Because the instant case had been tried prior to the Board's *St. John's* decision and there was no record evidence pertaining to the impact of employee solicitation and distribution in other areas of the Hospital, the court of appeals decided only that the Hospital's rule was invalid insofar as it sought to bar such employee activity in the cafeteria and coffee shop (Pet. App. 57-58). Accordingly, there is no conflict between the decision below and the Tenth Circuit's ruling in *St. John's Hospital and School of Nursing* v. *National Labor Relations Board*, 557 F. 2d 1368, which refused enforcement of a Board order holding invalid a hospital rule barring solicitation in all public areas of a hospital to which patients have access.[6] Cf. *Lutheran Hospital of Milwaukee Inc.* v. *National Labor Relations Board*, C.A. 7, No. 76-1688, decided October 5, 1977.

Moreover, review of the broader issue raised by petitioner would be inappropriate at this time in this case. The record is incomplete, and the Board has reopened a second proceeding involving the Hospital, in order to take additional evidence as to the application of the Hospital's no-solicitation/no-distribution rule in other areas of the Hospital accessible to patients, visitors, and employees.[7] If the Board's decision is adverse to the Hospital, petitioner will, at that time, be able to seek judicial review on a fully developed record.

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[6]The Board has decided not to seek review of the Tenth Circuit's decision in *St. John's*.

[7]On August 3, 1977, the Board issued an order remanding for further hearing a second case involving the Hospital's no-solicitation/no-distribution rule. *Beth Israel Hospital*, 228 NLRB No. 195, 95 LRRM 1087.

2. The only remaining question presented is whether the court of appeals properly sustained the Board's finding that the Hospital had not met its "burden * * * to show that special circumstances justified its curtailment of protected activities in [the cafeteria and coffee shop]" (Pet. App. 54). That question turns on the application of well-settled principles[8] to the facts of this particular case, and hence does not warrant further review. In any event, since the cafeteria and coffee shop were frequented mainly by employees and were open to a variety of other types of solicitation and distribution, the court of appeals correctly found that the Board's conclusion that the Hospital had to establish a special need for banning employee activity in these areas rested on a rational basis,[9] and that its determination is amply supported (Pet. App. 54-56):

> The hospital argues that solicitation and distribution activities among employees might "offend or upset

[8]As the court of appeals correctly noted (Pet. App. 53): "Principles governing an employer's limitation of solicitation and distribution by employee union organizers are by now fairly well settled. Rules which prohibit union solicitation on the employer's property during non-working time in any location have been held to be presumptively unreasonable and discriminatory in the absence of evidence of special circumstances to justify them. *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 804 * * *. Rules prohibiting distribution of literature are likewise said to be presumptively invalid if applied during non-working time in non-working areas."

[9]The court noted that the Board, finding that "a hospital's patient care function is * * * not * * * impaired by organizational activities in cafeterias and like areas [has] refused to apply to hospitals its precedents upholding no-solicitation rules when applied to non-working time activities of employees in department store sales floors and lunchrooms" (Pet. App. 54 n. 2). Recognizing that the detailed formulation of labor policy is the Board's responsibility, the court held that "[w]hile reasonable minds might differ as to the validity of such a distinction, we cannot say that the Board acted irrationally in

> patients and their visitors" gathered in the cafeteria and coffee shop, but the Board could conclude that such activities in these public areas would not constitute a sufficient threat to the treatment of patients, or to their recovery, to justify depriving employees of their organization rights. There was evidence of very substantial employee use of such areas, and the Board had to weigh the probable effect on ambulatory patients and visitors of employee solicitation and distribution activities in these natural gathering areas against the harm to employees of a ban. Beth Israel asserts that patients witnessing "table-hopping" and heated pro- and anti-union discussions will be subject to anxiety as they worry about "the security of their environment." But this assumes that irresponsible behavior will be the norm, and gives no weight to the fact that only ambulatory patients visit the cafeteria and coffee shop. We think the Board was entitled to reject this line of argument as unduly speculative. * * *
>
> Beth Israel argues that its no-distribution rule will prevent the union's "scurrilous" attacks on the hospital's health care from falling into the hands of patients or visitors. There was no evidence, however, that literature, offensive or otherwise, was distributed to patients or visitors. Employee Schunior testified that she took care to distribute only to employees. If in the future employee organizers deliberately distribute "scurrilous" literature to patients or visitors, the hospital may well have cause to discipline such employees. *Cf.* [*National Labor Relations Board*] v. *Local 1229, IBEW (Jefferson*

viewing hospital cafeterias differently, given the different factors affecting the different sorts of institutions, their employees, and their clientele" (*ibid.*).

> *Standard Broadcasting Co.*), 346 U.S. 464 (1953). In any event, the hospital cannot justify a rule prohibiting distribution to employees of all types of literature on the ground that some of the literature may be scurrilous. Such an argument might at most justify a rule directed at offensive literature. We conclude that the Board did not err in finding that the hospital had not justified its no-solicitation, no-distribution rule as it related to the cafeteria and coffee shop.[10]

Nor is review warranted because the Tenth Circuit, in *St. John's Hospital, supra*, rejected the distinction which the Board has drawn between hospital restaurants and those located in other types of establishments (note 9, *supra*), and refused to find that a ban on employee solicitation in the public cafeteria and gift shop there was unlawful. But see *Lutheran Hospital of Milwaukee Inc.* v. *National Labor Relations Board, supra*. Unlike the Hospital in this case, the institution in *St. John's* has an employee-only lunchroom and cafeteria which more than 80 percent of the employees used on a daily basis, and employee lounges and locker rooms open to all employees. 557 F. 2d at 1371. Noting these differences, the Tenth Circuit expressly found that "***Beth Israel*** is distinguishable from the present case in several respects * * *." *Id.* at 1375-1376 n. 7.

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[10]The court also rejected, as factually unsupported, the Hospital's contention that the union newsletter contained scurrilous subject matter which would upset patients (Pet. App. 55).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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